IN THE
SUPREME COURT OF THE UNITED STATES.

TERM, 194

NO.

WILLIAM LEITHOLD and EMILY LEITHOLD, Individually and as Co-Partners trading as CUSTOM MAID BRASSIERE COMPANY,

Petitioners,

vs.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinions Below.

Both the Court below and the District Court wrote opinions. The opinion of the Court below appears in the record at Page 66.

This opinion has not yet been reported in the official reports. The opinion of the District Court appears in the record at Page 45, and is published in 60 Fed. Supp. 909.

Jurisdiction.

The grounds on which jurisdiction of this Court is invoked is set forth in the Petition at Page 4 thereof.

Statement of the Matter Involved.

The statement of the matter involved appears in the Petition at Pages 2-3 thereof, and in the interest of brevity is not repeated herein.

Specification of Errors.

The errors which petitioners will urge if Writ of Certiorari be granted are that the Circuit Court of Appeals for the Third Circuit erred

1. In affirming the judgment of the District Court;

2. In holding that a violation of only the record-keeping provisions of GMPR and MPR 220 is a sufficient basis for the granting of an injunction against price-ceiling violations of the same regulations, despite the fact that the defendants kept and maintained the usual and normal business records, and despite the fact that it was not alleged, proved or found that the defendants had violated such price-ceiling provisions, or that they intended or threatened to violate them, or that such violation might be anticipated from the conduct of the defendants in the past.

Satutes Involved.

Emergency Price Control Act of 1942 (56 Stat. 23) as amended, 50 U.S.C.A. App. Section 925(a), 56 Stat. 33:

Sec. 4(a) (50 U.S.C.A. App. Section 904(a), 56 Stat. 28): Section 20(a) (50 U.S.C.A. App. Section 902(a) 56 Stat. 28).

GMPR (7 F.R. 3153 et seq.) Sections 11 and 12.
MPR 220, Sections 1315, 1557 (7 F.R. 7282).

NOTE: In the following argument, all italics used in quoting from judicial or text-book authorities are supplied.

ARGUMENT.

WHERE THE ONLY VIOLATION COMPLAINED OF IS FAILING TO OBSERVE THE RECORD-KEEPING PROVISION OF THE REGULATION, SHOULD THE COURT GRANT AN INJUNCTION AGAINST VIOLATING PRICE CEILINGS ESTABLISHED BY THE REGULATION?

As to the General Law on the Scope of Injunctions.

This Court has held that violation of one particular of a statute does not justify an injunction against violating the statute in any particular: New York, New Haven & Hartford, etc. R.R. v. I. C. C., 200 U. S. 361, 265 S. Ct. 272, 50 L. Ed. 515. There a carrier had violated a statute by entering into contracts to carry freight for less than its published rates. The District Court enjoined the carrier from carrying out the contracts. The Interstate Commerce Commission appealed because it had requested a broader injunction commanding the carrier "perpetually to observe in the future its published rates." As to this, the Supreme Court of the United States, speaking through the then Chief Justice White, said:

> "The contention, therefore, is that, whenever a carrier had been adjudged to have violated the act to regulate commerce in any particular, it is the duty of the Court, not only to enjoin the carrier from further like violations of the act, but to command it in general terms not to violate the act in the future in any particular. *In other words, the proposition is that, by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier ceases to be under the protection of the law of the land, and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it.* . . . To accede to the doctrine relied upon would compel us, *under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen.*" (50 L. Ed. pp. 526-7.)

And this Court restricted the injunction to one enjoining the Railroad from taking less than its published rates, *by means of dealing in the purchase and sale of coal.*

The same rule of law is laid down in 28 Am. Jur. 473:

> "If the wrongs complained of and against which injunctive relief is sought are alleged violations of a statute in certain particulars, *the decree may restrain the defendant from further like violations of the act, but should not enjoin in general terms violations of the act in the future in any particular, because an injunction of such general character would be violative of the elementary principles of justice, in that it would compel the defendant thereafter to conduct himself and his business under the jeopardy of punishment for contempt for violating a general injunction.*"

It is to be noted that the railroad case and the text authority just cited touch directly upon the question here.

As to the Relation Between Records and Prices.

The Express Publishing case[1] elaborated to some extent upon this rule of law, stating that "a federal court has broad power to restrain acts which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future, unless enjoined, may fairly be anticipated from the defendant's conduct in the past (85 L. Ed. 937).

And this Court went on to say immediately afterward:

> *"But the mere fact that a court has found that a defendant has committed an act in violation of a statute does not justify an injunction broadly to obey the statute and thus subject the defendant to contempt proceedings if he shall at any time in the future commit some new violation unlike and unrelated to that with which he was originally charged.* This court will strike from an injunction decree restraints upon the commission of unlawful acts as thus dissociated from those which a defendant has committed."

And the opinion continued:

> "It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts. *But we think that without sacrifice of that principle, the National Labor Relations Act does not contemplate that an employer who has unlawfully refused to bargain with his employees shall for the indefinite future, conduct his labor relations at the peril of a summons for contempt on the Board's allegation, for example, that he has discriminated against a labor union in the discharge of an employee, or because his*

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[1] NLRB v. Express Publishing Co., 312 U.S. 46, 61 S. Ct. 593, 85 L. Ed. 930.

supervisory employees have advised other employees not to join a union." (85 L. Ed. 937).

Clearly, there is as close a relation between refusal to bargain and discrimination (in a labor case) as there is between records and prices (in an OPA case): yet this Court has stated that the relationship is *not* sufficiently close to justify a restraint upon the act not committed.

It will thus be seen that the Express Publishing case restates principles enunciated in the New York, New Haven and Hartford case, *supra*, and leaves for determination only the narrow question whether the price ceilings of the regulation in question are so related (in the sense of the Express Publishing case) to record-keeping provisions, as to justify an injunction against one based upon violation only of the other.

Upon this point we have the decision of the Second Circuit answering the question in the negative: Bowles v. Sacher, 146 F 2d 186. The Court said at Page 187:

> "The appellant contends that because the appellees had violated the record-keeping requirements of the regulations and because the court found that failure to keep the required records creates 'danger of noncompliance with the provisions prescribing legal maximum prices', violations of the price limitations is a 'practical certainty.' But the District Judge drew no such inference; *nor do we.* The finding that lack of records produces danger of violation of the ceiling prices furnishes support for the injunction restraining the appellees from making sales 'unless and until' they prepare and keep the required records, and for the mandatory order directing them forthwith to do so; *but it does not compel an inference that they will sell above the legal maximum prices after they have established the required records.* Indeed, the natural inference is just the reverse, since price violations, if committed, can be more easily detected once the records

are established. Moreover, the plaintiff's affidavits contain no charge that the appellees have ever committed any violation of the regulations other than the failure to keep records."

The facts and the issues in the Sacher case exactly parallel those in the instant case: and the words just quoted from the majority opinion (one Judge dissented) constitute the clearest possible conclusion that record-keeping violations are not related to price-ceiling violations in the sense of the Express Publishing case. The Second Circuit was aware of that case, as shown by the fact that the dissenting Judge referred to it.

In accord with the conclusions reached in the Sacher case are also the following District Court cases:

Bowles v. Fisher & Co., Inc., 1 Price Control Cases, Section 51,027;

Bowles v. Sport Welt Shoe Co., Inc. (D.C.Mass.) 1 OPA Op. & Dec. Page 1181.

The plaintiff failed to cite a single case in his briefs, either in the Court below or in the District Court, where an injunction of so broad a scope was granted in any similar OPA case.

There Was No Finding of Fact That Price-Ceiling Violations Were to Be Anticipated.

The May Department Stores case, *supra*, interposes another obstacle to the broad injunction. There NLRB had imposed a cease and desist order covering, inter alia, acts not committed. This Court struck down that part of the order, saying at page 12 of the opinion:

"We think that, in the circumstances of this proceeding, although there is a violation of Section 8 (1) as well as 8 (5), the violation of 8 (1) is so intertwined

with the refusal to bargain with a unit asserted to be certified improperly *that without a clear determination by the Board of an attitude of opposition to the purposes of the Act* to protect the rights of employees generally, the decree *need not* enjoin Company actions which are not determined by the Board to be so motivated."

Since in the instant case there is *no* determination (i. e. no fact finding) or evidence that violation of price-ceilings are threatened or to be anticipated (let alone committed), there should be no injunction against such violation.

The Basis of the Opinion of the Court Below.

The opinion below accepts the plaintiff's contention that failure to maintain records and furnish information required by the regulations made it "practically impossible" for OPA to discover whether defendants were violating price ceilings or not (R. 72a).

If this conclusion is supposed to be reached on some factual basis, then the clear answer is that there is not a shred of evidence in the record to support it.

If the conclusion was reached by the Court below on the basis of reasoning or logic, then the answer is that the conclusion is erroneous. Price ceilings are fixed in the applicable regulations upon the basis of the prices at which sales were made in a base period: or on competitors' prices in the base period: or by a formula based on nearest comparable commodities sold. Except for competitors' prices, (as to which OPA has better access than the defendants), all the records required to be kept by GMPR, and all the information required to be furnished by MPR 220, are simply taken by the seller from his own business records. It is true that maintaining the required records and furnishing the required information renders access to the data

easier and *more convenient:* but the failure to maintain the records or file the information certainly cannot and does not make detection of price ceilings "*practically impossible.*" All OPA has to do is have its accountants go over the normal and usual business records (they are subject to subpoena if access is refused) and make up the required records and information from them. Despite violation of record-keeping provisions, therefore, it is perfectly feasible and possible—and not even difficult—for OPA to detect price-ceiling violations.

Conclusion.

A. It is a general principle of law that acts neither committed nor threatened should not be enjoined: New York, New Haven and Hartford R.R. Co. v. Interstate Commerce Commission, *supra.*

B. Records and prices are not so closely related as to justify an injunction against price-ceilings when there has been no violation thereof: N.L.R.B. v. Express Publishing Co., *supra;* Brown v. Sacher, *supra.*

C. Acts not committed should not be enjoined unless there is a clear determination, i. e., a fact-finding, that they may fairly be anticipated from other violations closely enough related: May Department Stores v. N.L.R.B., *supra.* In the case at bar there was no such closeness of relation and no determination that the violation of price-ceilings might be anticipated.

D. Violation of record-keeping provisions do not make it practically impossible or even difficult to detect price-ceiling violations.

E. Certiorari should be granted, so that the decree of the District Court may be modified by striking therefrom the restraint against violation of price-ceilings.

Respectfully submitted,

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